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APPENDIX

No.

Order by District Court Granting Judgment to the Respondent against Petitioner dated July 20, 2004. . . Vol. I, App. I

Decision by Eleventh Circuit Court of Appeals Affirming the Decision by the lower court ..... Vol. I, App. II

Decision by Eleventh Circuit Court of Appeals Denying Motion for Rehearing and Rehearing En Banc .. Vol. I, App. III

The United States District Court for the Northern District of Georgia rendered decision in favor of the Respondents against Petitioners Title 42 U.S.C § 1983 claim against the Respondents dated April 23, 2004[1]. . . Vol. II Decision

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1. Pursuant to Supreme Court Rule 14, 1(h)(i) the Petitioner apologizes that she should have included the Order by District Court Granting Judgment to the Respondent against Petitioner dated April 23, 2004 as Vol I, App. IV verses Vol. II.

of the Administrative
Hearing Officer Dated July 16, 2001 .... Vol. I, App. IV

Decision of the State of Georgia,
Department of Labor, Office of the
Board of Review Vol. I, App. V

Federal

Title 18 U.S.C. § 241... ..... Vol.III, App. A

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Title 42 U.S.C § 1983 ..... Vol.III, App. D

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20-2-940(a)(1)-(8).. . Vol.III, App. E

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O.C.G.A. § 34-8-157(b).. .... Vol.III, App. G

O.C.G.A. § 34-8-178 ..... Vol.III, App. H

O.C.G.A. § 34-8-192 ..... Vol.III, App. I

O.C.G.A. § 34-8-194(2)(A). ..... Vol. III, App. J

O.C.G.A. § 34-8-195(a)(3).. ..... Vol. III, App. K

O.C.G.A. § 34-8-220(a).. .... Vol. III, App. L

O.C.G.A. § 34-8-220(b). ... . Vol. III, App. M

O.C.G.A. § 34-8-221(a) to (e) . . . Vol.III, App. N

O.C.G.A. § 34-8-223(a) . . . . . Vol.III, App. O

O.C.G.A. § 34-8-223(b) . . . . . Vol III, App.P

Decision by Eleventh Circuit Court
of Appeals Affirming the Decision
by the lower court
dated September 10, 1999
Aubrey S. Whelchel v.
City of Covington, Georgia, et al., Vol. III, App. Q

Decision by Eleventh Circuit Court
of Appeals Denying Motion for Rehearing
and Rehearing En Banc
dated October 29, 1998
Aubrey S. Whelchel v.
City of Covington, Georgia, et al., Vol. III, App.R

To the Supreme Court of the United States:

Comes now Irene L. Stephens, the Petitioner in this case, and files this Petition for Writ of Certiorari.

OPINION BELOW

The decision rendered by the Eleventh Circuit Court of Appeals denying Petitioner's request for review and reconsideration and en banc determination (App., Vol.I, App. I)

The decision rendered by the Eleventh Circuit Court of Appeals affirming the judgment of the district court (App. , Vol.I, App. II)

The decision rendered by the Eleventh Circuit Court of Appeals denying Petitioner's request for review and reconsideration and en banc determination (App., Vol.I, App. I)

The United States District Court for the Northern District of Georgia rendered a decision for the Respondents against Petitioner (App., Vol.I, App. III)

The United States District Court for the Northern District of Georgia rendered a decision in favor of the Respondents against Petitioners Title 42 U.S.C § 1983 claim against the Respondents (App., Vol.II)

Opinion of the Administrative Hearing Officer Dated July 16, 2001. Appendix , Vol.I, App. IV

Opinion of the State of Georgia, Department of Labor,

Office of the Board of Review, Suite 801, 148 International Boulevard N.E., Sussex Place, Atlanta, Georgia, Dated September 11, 2001. (Appendix , Vol.I, App. V)

STATEMENT OF JURISDICTION

The judgement of the Eleventh Circuit Court of Appeals in Atlanta, Georgia was entered on May 31, 2005. Petitioner sought a timely rehearing of the decision by the panel and sought an en banc determination which was denied on August 17, 2005.

Jurisdiction of this Court is founded on 28 U.S.C. § 1257. Under Rule 10 of the Supreme Court Rules, this Court should grant this Petition. It is the Petitioner's position that there is precedent for this Court to grant the Petitioner's Petition for Writ of Certiorari. The decision of the United States District Court and the Decision of the United States Court of Appeals for the Eleventh Circuit at Atlanta, Georgia in the instant case has now resulted is a conflict of common law the United States Court of Appeals for Third Circuit at Philadelphia, Pennsylvania and the United States Court for Eleventh Circuit involving federal civil rights cases. The United States Court of Appeals for the Third Circuit decided the precedential case of **United States of America v. Thomas Smith, Brian Smith, Andrew Garth, Tyrone Payton, Paul Carpenter, Jr.**, 294 F.3d 473 (3rd Cir. 2002). Sometime during the year 2005, the media reported that the former Orange County, New Jersey police officer Mr. Andrew Garth lost a federal trial by jury in the State of New Jersey and was sent to federal prison for violations of Mr. Earl Faison's civil right under and pursuant to Title 18 U.S.C. § 241 and substantive crimes against Mr. Earl Faison under and pursuant to Title 18 U.S.C. § 242. Mr. Garth was relieved of his official duties as a police officer by the Orange County police department, at some point later Mr. Garth appealed the adverse employment action and subsequently was denied unemployment insurance benefits, i.e. Mr.Garth lost his employment appeal case. It is the Petitioner's contention that there

is a conflict of common law between the United States Court of Appeals for Third Circuit and the United States Court for Eleventh Circuit. In the Third Circuit, Mr. Garth lost his employment appeal case and he was eventually found guilty of federal civil rights violations and substantive crimes under the most stringent evidence standard. While the Petitioner in the instant case prevailed at her state administrative hearing i.e. she won her employment appeal case and did not prevail in her federal civil rights case in the lower federal courts located in the State of Georgia.

Moreover, the Honorable Court has recently granted certiorari in the case of **Marshall v. Marshall** from the United States Court of Appeals for the Ninth Circuit in San Francisco, California . The **Marshall** case was docket as Supreme Court Case. No. 04-1544. The **Marshall** case involved conflicting judgments that decided the claims of the surviving spouse between three courts: the United States District Court, the United States Bankruptcy Court an the Texas Probate Court. The United States Court of Appeals for the Ninth Circuit reversed all judgments awarded to the surviving spouse by the bankruptcy and district courts located in the State of California. If the Honorable Court should reverse the decision of the Ninth Circuit Court of Appeals in **Marshall**, the Ninth Circuit opinion will be consistent with the common law of the Third Circuit opinion in **United States v. Andrew Garth, et al**. However, Petitioner respectfully advances that the Eleventh Circuit Court of appeals is taking an inapposite view common law than that of the United States Court of Appeals for the the Third Circuit and possibly the Ninth Circuit. It is the Petitioners position that the surviving spouse in **Marshall** cannot lose trial by jury in the State of Texas and prevail in federal courts in California. Likewise, while Mr. Garth lost a state administrative proceeding and would later be found guilty in a New Jersey federal district court of federal civil rights violations and federal substantive crimes, while the petitioner in the instant case prevailed at her state administrative hearing and did not prevail in her federal civil rights case at the federal courts below.

Moreover, Petitioner respectfully advance her contention that the Georgia federal court's in this case have completely ignored the ultimate power and authority of this courts decisions as the law of the land as directly relating and rendered in the decision of **University of Tennessee v. Elliot** when the Court held:

"However, when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts in actions under the Reconstruction civil rights statutes must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts (a matter for resolution on remand here). In enacting those statutes, Congress did not intend to create an exception to general rules of preclusion, or to foreclose the adaptation of those rules to such subsequent developments as the use of administrative adjudication. Giving preclusive effect in federal courts to the factfindings of state administrative bodies acting in a judicial capacity serves both the value of enforcing repose, which underlies general principles of collateral estoppel, and the value of federalism. Quoting **University of Tennessee v. Elliot**, 478 U.S. 788, 789 (1986).

Unfortunately, Petitioner respectfully adva ce the Georgia federal court decisions as render in the instant case has now resulted in a direct split in law of this land between the United States Court of Appeals for the Sixth Circuit of Cincinnati, Ohio and Eleventh Circuits. Moreover, the federal courts in Georgia have negated the ultimate authority and power of the Honorable Court.

The petitioner respectfully advances the District Court and Eleventh Circuit Court of Appeals in Atlanta, Georgia cannot, in the instant case, fashion their own remedies but instead must apply the common law of State of Georgia under the principles of stare

decisis and precedent, as well as its statutory and constitutional law. Petitioner's respectfully advances that there is precedent for this Honorable Court to grant the Petitioner's Petition for Writ of Certiorari when the Supreme Court presumes that Court of Appeals decide questions of state law correctly, but that presumption is inapplicable if the Court of Appeal was "plainly wrong." **Leavitt v. Jane L.**, 520 U.S. 164 (1994)

Moreover, the Honorable Court may retain jurisdiction to determine if the Honorable Court has jurisdiction. See **United States v. United Mine Workers**, 330 U.S. 258, 291 (1947), **Mansfield Coldwater & Lake Michigan Ry. Co. v. Swan,** 111 U.S. 379, 387 (1884). The instant case involves interpretation of the constitution, so it can only be altered by an amendment to the Constitution or change in the Honorable Courts position. See **Seminole Tribe v. Florida**., 517 U.S. 44 (1996).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I Section 10, United States Constitution —

> ***No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, expost facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.***
>
> ***No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of***

the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay and Duty of Tonnage, keep Troops, or ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article 4 Section 1, United States Constitution

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amendment IV, United States Constitution —

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V, United States Constitution —

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII, United States Constitution —

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment XIV, Section 1,
United States Constitution —

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XIV, Section 5,
United States Constitution —

The Congress shall have power to enforce this

article by appropriate legislation.

STATEMENT OF THE CASE

A. Course of Proceedings & Disposition of the Case Below

On July 6, 2001, pursuant to O.C.G.A.§ 34-8-220(b) Judge Smith held a formal hearing for Petitioners appeal from the earlier decision as a Georgia Department of Labor field office.

On June 15, 2001, the Petitioner pursuant the First, Fifth and Fourteenth to the United States Constitution and Title 42 U..S.C. § 1983 requested relief from the Equal Employment Opportunity Commission and the Georgia Division of the E.E.O.C.

On July 16, 2001 the Honorable Mary A. Smith, ruled that the Respondent's termination of the Petitioner was in wilful violation of Petitioner's rights and protections pursuant to Rule 15 of the Rules and Regulations of the State Personnel Board for the State of Georgia. Petitioner was terminated without just cause and in violation of Rule 15 of the Rules and Regulations of the State Personnel Board for the State of Georgia.

On September 11, 2001, Pursuant to O.C.G.A.§ 34-8-221 et seq., the State of Georgia, Department of Labor, Office of the Board of Review adopts the administrative hearing officers finding.

On June 11, 2002, the Petitioner pursuant to Title 42 U.S.C. § 1983 and requested relief from United States District Court for the Northern District of Georgia, Atlanta Division against the Respondent.

On April 23, 2004, Order by district court granting Judgment to the Respondent against Petitioners Title 42 U.S.C § 1983 claim.

On July 20, 2004, Order by district court granting Judgment to the Respondent against the Petitioners Title VII

claims.

On August 19, 2004, Petitioner tendered a timely Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit.

On May 31, 2005, the Eleventh Circuit Court of Appeal ruled in favor of the Respondent.

On August 17, 2005 Respondent tendered a timely motion for review and reconsideration which was denied.

B. Statement of Facts

While Petitioner resided in Virginia Beach, Virginia, Petitioner came across an employment ad relating to the Georgia Department of Transportation (hereinafter referred to as "Respondent").

The ad offered permanent employment as a transportation engineer, with a beginning salary of $29,238.00, plus benefits. The Petitioner's job title was designated as a transportation engineer associate. At the time of the instant ad, Petitioner had graduated Old Dominion University with Bachelor of Science Degree in Civil Engineering.

Petitioner contacted the Respondent, by and through the Respondent's authorized agent, Ms. Kim Cameron, a GDOT employment recruiter, in Atlanta, Georgia. An employment interview was scheduled and Petitioner traveled to Atlanta, Georgia. After meeting with Ms. Cameron, in Atlanta, Petitioner tendered an employment application for employment as an transportation engineer associate with the Respondent. The Respondent, upon reviewing Petitioner's qualifications, requested that the Petitioner return to Atlanta for a second interview by Irene Belinfante, P.E., John Tiernan, and Paul Liles, Jr., which resulted in a letter of notification that the Respondent had chosen to deny Petitioner the employment position as advertised.

Notwithstanding the fact that the Respondent had denied the Petitioner's employment application, Petitioner received a telephonic communication to come back to Atlanta for another

interview for the same position which Petitioner had been previously turned down for. On the morning of the date of the second interview, as Petitioner was preparing to leave to take an airline flight to Atlanta, Petitioner received another telephonic communication that the interview had been canceled.

Petitioner thereinafter telephonically contacted Ms. Cameron and still expressed interest in an engineering position with the Respondent when and if one opened up. Ms. Cameron thereinafter contacted Petitioner about another engineering opening which had open and another interview was scheduled and Petitioner, once again traveled to Atlanta, Georgia for a second interview for an engineering position with the Respondent. This third interview took place with Kevin Vinson and Tim Rader relating to an employment position as an engineering technician. Petitioner accepted the employment position and when Petitioner traveled to Atlanta to commence Petitioner's employment with the Respondent, Petitioner was placed in a management position as a transportation engineer versus an engineering technician.

At all times, Respondent's employment offers to the Petitioner was that of a permanent employee and when Petitioner commenced working for the Respondent, the Respondent's authorized agent provided Petitioner with a copy of the 1994 Employee Handbook and told that said document contained all employment rights and benefits which the Respondent was retaining the Petitioner under and pursuant to the Petitioner's employment with the Respondent. Under and pursuant to the 1994 Employee Handbook, Petitioner was considered and employed by the Respondent as a permanent employee under and pursuant to Rule 15 of the Rules and Regulations of the State Personnel Board for the State of Georgia.

On April 1, 1999, Petitioner began employment, with the Respondent. Respondent also laterally assigned the Petitioner to a two-year training program Petitioner while employed with the Respondent had no routine work assignment.

Petitioner requested a job transfer to work in the Office of Bridge Design, however, Petitioner was illegally and

discriminatory terminated by the Respondent. As a permanent employee, Petitioner sought relief before the Georgia Department of Labor.

During November 2000, Stephens requested a job transfer to work in the office of Bridge Design, On or about November 30, 2000, Respondent's employee Ms. Velvia Caldwell makes false accusation against Petitioner , that Petitioner called Caldwell and Petitioners supervisors "those coon bastards".

On December 7, 2000, the Respondent's employee Mr. Darrell Williams provides petitioner with an absolute implicit waiver from the Respondent for any and all alleged faults of Petitioner by ordering Petitioner to drive Respondents vehicle to a highway construction project and work for approximately four (4) hours, with the Respondents employees Ms. Velvia Caldwell, Mr. Stephen Henry, Ms Rachel Brown, Ms. Cheryl Davis, and Mr. Donald LaFrenier. Mr. Darrell Williams thereby reinstating Petitioners employment. At approx. 1:30 P.M., Mr. Henry, orders Petitioner to leave the job site and go home, thereby rescinding Petitioners employment. Mr. Henry, inexplicably reinstates Petitioners employment for December 8, 2000 asking Petitioner to attend a meeting with Mr. Williams on December 8, 2000 and after the conclusion of the meeting with Mr.Williams, Mr. Williams would drive Petitioner for an appointment with Stephen J. Sampson, CSI psychologist for an alleged "stress test". Mr. Henry all the while knowing that Mr. Williams had just provided Stephens with a implied waiver for all alleged acts, actions and behavior of Petitioner which was the alleged basis for the "stress test". Moreover, on December 7, 2000, Ms. Rachel Brown rescind Petitioners employment by issuing "Recommendation for disciplinary action" all the while knowing that Mr. Williams had just provided Petitioner with a absolute implied waiver and Mr. Henry allegedly had reinstated Petitioners employment for December 8, 2000.

On December 11 and December 12, 2000 Stephens was illegally and indiscriminately terminated by Stephen Henry via two (2) letters delivered to Stephens from Stephen Henry by United

States Mail. Respondent illegally terminated the petitioners employment. As a permanent employee, Petitioner sought relief before the Georgia Department of Labor.

On or about February 11, 2001, Petitioner telephonically applied for unemployment benefits with the Georgia Department of Labor against the Respondent .and was denied the same.

On July 6, 2001, pursuant to O.C.G.A.§ 34-8-220(b) Judge Smith held a formal hearing for Petitioners appeal from the earlier decision as a Georgia Department of Labor field office.

On June 15, 2001, the Petitioner pursuant to Title 42 U.S.C. § 1983 and the First, Fifth and Fourteenth to the United States Constitution and Title 42 U..S.C. § 1983 requested relief from the Equal Employment Opportunity Commission and the Georgia Division of the E..E.O.C.

On July 16, 2001 Honorable Mary A. Smith, of the Georgia Department of Labor ruled that the Respondent's termination of the Petitioner was in wilful violation of Petitioner's rights and protections pursuant to Rule 15 of the Rules and Regulations of the State Personnel Board for the State of Georgia. Petitioner was terminated without just cause and in violation of Rule 15 of the Rules and Regulations of the State Personnel Board for the State of Georgia.

On September 11, 2001, Pursuant to O.C.G.A.§ 34-8-221 et seq., the State of Georgia, Department of Labor, Office of the Board of Review adopts the administrative hearing officers finding. The Respondent ***never*** appealed that decision.

On June 11, 2002, the Petitioner Pursuant to Title 42 U.S.C.§ 1983 et seq. filed a timely civil rights complaint within the time allotted in the United States District Court for the Northern District of Georgia, Atlanta Division

On April 23, 2004, Order by district court granting Judgment to the Respondent against Petitioners Title 42 U.S.C § 1983 claim notwithstanding un-refutable evidence of judicial determination, as rendered by the Georgia Department of Labor that Petitioner's employment termination was not proper and/or valid.

On July 20, 2004, Order by district court granting Judgment to the Respondent against the Petitioners Title VII claims.

On August 19, 2004, Petitioner tendered a timely Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit.

On May 31, 2005, the Eleventh Circuit Court of Appeal ruled in favor of the Respondent.

On August 17, 2005, the Eleventh Circuit Court denied Petitioner's Motion for Rehearing.

ARGUMENT AND AUTHORITIES

The totality of the Respondent's defensive claims were legally destroyed prior to the filing of the Petitioner's reconstruction civil rights complaint, by and through the formal decision, as rendered by the Georgia Department of Labor.[2]

The issue of the *Rooker-Feldman* Doctrine was never raised by the Respondents in the district court. Nor did the district court render any judgment based upon the *Rooker-Feldman* Doctrine.

Petitioner respectfully avers that the decision by the Eleventh Circuit Court of Appeals not to apply the *Rooker-Feldman* Doctrine to the instant case as controlling is wrong.

Petitioner would respectfully aver that the decision by the Eleven Circuit Court of Appeals in the instant case is in conflict with its previous decisions in the case of **Aubrey S. Whelchel v. City of Covington, Georgia, et al.**, See Appendix Vol. III, App. XII and App. XIII

It should be noted that the Respondent City of Covington,

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2. **District of Columbia Court of Appeals v. Feldman**, 460 U.S. 462, 103 S.Ct. 1303, 1317 (1983); **Rooker v. Fidelity Trust Co.**, 263 U.S. 413, 414, 44 S Ct. 149, 150 (1923); **Harris v. Zion's Sav. Bank or Trust Co.**, 317 U.S. 447, 450-53 (1943), **University of Tennessee v. Elliot**, 478 U.S. 788, 789 (1986).

nor the district court raised or held that the Petitioner's civil rights case was foreclosed by application of the *Rooker-Feldman* Doctrine. The *Rooker-Feldman* Doctrine appeared sua sponte by the Eleventh Circuit Court of Appeals panel in **Whelchel** advancing the *Rooker-Feldman* Doctrine was applicable And the district court in the Petitioners case did not address the Rooker-Feldman Doctrine.

The *Rooker-Feldman* doctrine provides that the lower federal courts lack subject matter jurisdiction over a case if the exercise of jurisdiction over that case would result in the ***reversal or modification of a state court judgment***. Such jurisdiction is lacking because within the federal system, only the Supreme Court may review a state court judgment.

The first case to identify this principle was **Rooker v. Fidelity Trust Co.**, 263 U.S. 413, 44 S Ct. 149 (1923). There, the plaintiff sought a declaration from the federal district court that a judgment of the Indiana state court was null and void because it violated the Contracts Clause. Id. at 414-15, 44 S. Ct. at 150. Interestingly, the plaintiff had petitioned the Supreme Court for direct review and been denied, so that the suit represented an end run around direct review. Id. at 414, 44 S. Ct. at 150. In holding that the district court lacked jurisdiction over the case, the Supreme Court stated that "[under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character." Id. at 416, 44 S.Ct. at 150.

In 1938 this Court proclaimed, "there is no general federal common law." **Erie Railroad Co.v Tompkins**, 304 U.S. 64 (1939).

Sixty years passed before the Supreme Court revisited **Rooker**, and when it did, it was concerned with the deference owed to the local courts of the District of Columbia rather than a state. In **District of Columbia Court of Appeals v. Feldman**, 460 U.S. 462, 103 S Ct. 1303 (1983), plaintiffs brought separate actions challenging the validity of a rule of the District of Columbia that prevented them from sitting for the District's bar exam. Feldman

decided that whether a federal challenge is foreclosed depends in part on whether the state proceedings were "judicial in nature." Id. at 476, 103 S Ct. at 1311. The Supreme Court drew a distinction – potentially critical in the present case – between a challenge to the rule governing bar admission and a challenge to a judgment of a state court applying that rule. Because promulgation of a rule is a non-judicial act, a federal court would have jurisdiction over a general challenge to state bar rules. Id. at 485-86, 103 S Ct. at 1316-17. By the same token, a federal court would lack jurisdiction over challenges to state court decisions in particular cases arising out of judicial proceedings, even if those challenges allege that the state court's action is unconstitutional. Id. at 486, 103 S. Ct. at 1317. The Feldman Court further noted that a federal court lacks jurisdiction over any claims that are "inextricably intertwined" with a state court's determinations in a judicial proceeding. Id. at 482 n. 16, 103 S Ct. at 1315 n. 16.

Moreover, The Eleventh Circuit in **Powell v. Powell**, 80 F.3d 464 (11th Cir. 1996), ruled that granting Mr. Powell relief would "effectively nullify" the state court's judgment and therefore holding that because district court holding would "effectively reverse the state court judgment," the federal claim was "inextricably intertwined" with the state court judgment and the result would be that the state court's judgment would be collaterally reviewed and reversed in federal court, which is precisely what the *Rooker-Feldman* doctrine exists to prevent. See **Liedel v. Juvenile Court of Madison County**, 891 F.2d 1542, 1545 (11th Cir. 1990); see also **Stern v. Nix**, 840 F.2d 208, 211-12 (3rd Cir.), cert. denied, 488 U.S. 826, 109 S Ct. 77, 102 L Ed.2d 53 (1988).

This Court has said in the case of **Harris v. Zion's Sav. Bank & Trust Co.**, 317 U.S. 447, 450-53 (1943)("The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate."). The court's statement in Harris that "the federal courts have no probate jurisdiction and

have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction" suggest that the probate exception also encompasses federal question cases. 317 U.S. at 447, 450 (emphasis added.). Quoting **In re Marshall**, 392 F.3d 1118, C.A.9 (Cal.), 2004, Sec. V, ¶ 2.

Consistent with Harris, the court has said that, in applying the probate exception, "[t]he evil to be avoided is federal interference with state probate proceedings." Hilton v. Mumaw, 522 F.2d 588. 593 (9th Cir. 1975).. This rationale is as relevant to federal question cases as it is to diversity ones. Quoting **In re Marshall**, 392 F.3d 1118, C.A.9 (Cal.), 2004, Sec. V, ¶ 3.

Again, the respondent never appealed the decision of the Georgia Department of Labor to any Georgia State Court. When the district court entered a judgment in favor of the Respondent and the Eleventh Circuit Affirmed the same, the power of the Georgia Department of Labor tribunal was negated.

The United States Court of Appeals for the Ninth Circuit has said in the case of **In re Marshall**:

"Where a state has regulated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lacks jurisdiction over matters. McCan v. First Nat'l Bank of Portland, 139 F. Supp. 224, 227 (D.Or. 1954), aff'd, 229 F.2d 859 (9th Cir. 1956). A state court's holding regarding its jurisdiction over probate matters is binding on federal courts and is immune from collateral attack under the doctrine of res judicata. Underwriters Nat'l Assurance Co. V. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706-07 (1982); Dufree v. Duke, 375 U.S. 106, 111, 115-16 (1963). Quoting **In re Marshall**, 392 F.3d 1118, C.A.9 (Cal.), 2004, Sec. V, ¶ 10.

In **Utah**, "the Court declared that res judicata might apply to administrative agency decisions '[w]hen [the] administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" Citing **Gjellum v. City of Birmingham,**

Ala., 829 F.2d 1056 (11th Cir. 1987).

This Court has said in the case of **United States v. Utah Construction Company**:

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply **res judicata** to enforce repose. **Sunshine Coal Co. v. Adkins**, 310 U.S. 381; **Hanover Bank v. United States**, 152 Ct. Cl. 391, 285 F.2d 455; Fairmont **Aluminum Co. v. Commissioner**, 222 F.2d 622; **Seatrain Lines, Inc. v. Pennsylvania R.Co.**, 207 F.2d 255.[fn 21] See also **Goldstein v. Doft**, 236 F.Supp. 730, aff'd 353 F.2d 484, cert. denied, 383 U.S. 960, where collateral estoppel was applied to prevent re-litigation of factual disputes resolved by an arbitrator."[3]

This Court has said in the case of **University of Tennessee v. Elliot**:

Held: 1. Title 28 U.S.C. § 1738 is not applicable to the unreviewed state administrative factfinding at issue here. However, federal common-law rules of preclusion have been frequently fashioned in the absence of a governing statute. Because § 1738 antedates the development of administrative agencies it does not represent a congressional determination that state administrative agency decisions should not be given preclusive effect. Pp. 794-795...

3. However, when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts in actions under the Reconstruction civil rights statutes must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts (a matter for resolution on remand here). In enacting those statutes, Congress

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3. Citing **United States v. Utah Construction Company**, 384 U.S. 394, 422 (86 S.Ct. 1545,1560) 16 L.Ed.2d 642) (1966). Quoting **Sunshine Coal Co.v Adkins**, 310 U.S. 381 (60 S.Ct. 907, 909)(1940).

did not intend to create an exception to general rules of preclusion, or to foreclose the adaptation of those rules to such subsequent developments as the use of administrative adjudication. Giving preclusive effect in federal courts to the factfindings of state administrative bodies acting in a judicial capacity serves both the value of enforcing repose, which underlies general principles of collateral estoppel, and the value of federalism. Quoting **University of Tennessee v. Elliot**, 478 U.S. 788, 789 (1986)

This Court has said in the case of **Marrese v. American Academy of Ortho. Surgeons**:

"The issue whether there is an exception to § 1738 arises only if state law indicated that litigation of a particular claim or issue should be barred in the subsequent federal proceeding."[4]

This Court has said in the case of **Johnson v. Drew**:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. **Johnson v. Towsley**, 13 Wall. 72; **Smelting Company v. Kemp**, 104 U.S. 636; **Steel v. Smelting Company**, 106 U.S. 447; **Wright v. Roseberry**, 121 U.S. 488; **Heath v. Wallace**, 138 U.S. 573; **McCormick v. Hayes**, 159 U.S. 332."[5]

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4. Citing **Marrese v. American Academy of Ortho. Surgeons**, 470 U.S. 373, 383 (105 S.Ct. 1327, 1333) (1985).

5. Citing **Johnson v. Drew**, 171 U.S. 93, 99-100 (18 S.Ct. 800, 802) (1898). Quoting **Steel v. Smelting Company**, 106 U.S. 447 (1 S.Ct. 389, 396) (1882), **Wright v. Roseberry**, 121 U.S. 488, 509 (7 S.Ct. 985, 999)(1887),

In Georgia for example, "In any judicial proceeding under this Code section, the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." O.C.G.A.§ 34-8-223(b)." Citing **McGahee v. Yamaha Motor Mfg. Corp.**, 214 Ga. App. 473, 338 S.E.2d 249 (1994) and Georgia Employment Security Law, Georgia Department of Labor, Michael L. Thurmond, Commissioner, 1999 Ed., p. 148.

Statue; O.C.G.A. § 34-8-223 states:

> " (a) Any decision of the board of review, in the absence of a reconsideration as provided in subsection (d) of Code Section 34-8-192, shall become final 15 days after the date of notification or mailing. Judicial review shall be permitted only after any party claiming to be aggrieved thereby has exhausted his or her administrative remedies as provided by this chapter. The Commissioner shall be deemed to be a party to any judicial action involving any such decision and shall be represented in any such judicial action by the Attorney General.
>
> (b) Within 15 days after the decision of the board of review has become final, any party aggrieved thereby may secure judicial review by filing a petition against the Commissioner in the superior court of the county where the employee was last employed. In the event the individual was last employed in another state, such appeal shall be filed in Fulton County, Georgia. Any other party to

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Heath v. Wallace, 138 U.S. 573 (11 S.Ct. 380, 384)(1891), **McCormick v. Hayes**, 159 U.S. 332 (16 S.Ct. 37, 43)(1895).

the proceeding before the board of review shall be made a respondent. The petition, which need not be verified but which shall state specifically the grounds upon which a review is sought, shall be served upon the Commissioner or upon such person as the Commissioner may designate, and such service shall be deemed completed service on all parties, but there shall be left with the party so served as many copies of the petition as there are respondents. The Commissioner shall mail one such copy to each such respondent.

Within 30 days after the service of the petition, the Commissioner shall certify and file with the superior court all documents and papers and a transcript of all testimony taken in the matter, together with the board of review's findings of fact and decision therein. The Commissioner shall not be required to furnish any person with a copy of the aforementioned documents, papers, or transcripts or the original of these items prior to the Commissioner's filing these items with the court. The Commissioner may also, in his or her discretion, certify to such court questions of law involved in any decision. As a guide for future interpretation of the law, when the Commissioner is aggrieved by any decision of the board of review or deems such decision contrary to the law and no other party enters an appeal therefrom, the Commissioner may, within 20 days after such decision has become final, appeal and certify to the superior court questions of law therein involved. The court shall consider and determine the same and enter a decree accordingly, which shall be subject to further appeal by the Commissioner. In any judicial proceeding under this Code section, the

findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all other civil cases except cases to which the state is a material party and cases arising under Chapter 9 of this title.

An appeal may be taken from the decision of the superior court to the Court of Appeals in the same manner as is provided in civil cases but not inconsistent with this chapter. No bond shall be required for entering an appeal."

The Georgia Department of Labor is bound by its own judicial decisions, conduct and legal positions that are and have been rendered by Georgia court's in the cases of:

"If there is any evidence to support a finding of the Board of Review, it will be approved. **Caldwell v. Charlton County Bd. Of Educ.**, 157 Ga. App. 395, 277 S.E.2d 764 (1981); **Brown v. Caldwell**, 165 Ga. App. 743, 302 S.E.2d 359 (1983); **Green v. Tanner**, 186, Ga. App. 715, 368 S.E.2d 162 (1988)(decided under Ga.L.1937, p.806 and former § 34-8-176). The Superior Court is not authorized to weigh the evidence and substitute its fact findings for those of the administrative tier of fact. **McGahee v. Yamaha Motor Mfg. Corp.**, 214 Ga. App. 473, 338 S.E.2d 249 (1994)."[6]

It is Petitioners position her unemployment insurance case was decided under the any evidence standard since the judicial decision rendered in the same did not mention any

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6. Citing Georgia Employment Security Law, Georgia Department of Labor, Michael L. Thurmond, Commissioner, 1999 Ed., p. 149

section of O.C.G.A. § 24-1-1(1) to (7). Likewise, the "any evidence" standard as stated in **Gorin v. Osborne**, 756 F.2d 834 (11th Cir. 1985) applies to the instant case.

The Supreme Court of Georgia has said in the case of **McNeal v. Paine, Webber, Jackson & Curtis, Inc.**:

"This Court has held in **Pope v. City of Atlanta**, 240 Ga. 177 (240 S.E. 2d 241)(1977), and, more recently, in **Hill v. Wooten**, 247 Ga. 737 (279 S.E. 2d 227)(1981), that " . . . where a party fails to present a state law claim in federal court, a later suit will be barred if the state claim could have been litigated in the federal court under its pendent jurisdiction." **Hill v. Wooten**, supra. at 73"[7]

The Georgia Court of Appeals has said in the case of **Dickerson v. Dickerson:**

"'[C]ollateral estoppel applies where an issue of fact or law is actually litigated and determined by a valid judgment, and the determination is essential to the judgment. That determination in then conclusive in a subsequent action between the same parties.' See **Kent v. Kent**, 265 Ga. 211 (1)(452 S.E.2d 764)(1995). This concept, sometimes known as estoppel by judgment or issue preclusion, precludes the re-adjudication of issues already litigated to a conclusion in a previous action between the parties. See **Allen v. King Plow Co.**, 227 Ga. App. 795, 798 (1) (490 S.E.2d 457) (1997) (whole court); **Sorrells Constr. Co. v. Chandler Armentrout & Roebuck, P. C.**, 214 Ga. App. 193, 193-194 (447 S.E.2d 101) (1994)."[8]

Additionally, the Georgia Appeals Court has said in the case of **Smith v. Maytag Corp.** :

"[U]nder the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the

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7. Citing **McNeal v. Paine, Webber, Jackson & Curtis, Inc.**, 249 Ga. 662, 663 (1982).

8. Citing **Dickerson v. Dickerson**, 247 Ga. App. 812, 813-815 (2001) 545 S.E.2d 378.

judgment in the prior suit precludes re-litigation of issues actually litigated and necessary to the outcome of the first action. (Cits.)' **Parklane Hosiery Co. v. Shore**,[9] 439 U.S. 322, 326, n. 5 (99 S.Ct. 645, 58 L.Ed.2d 552) (1979); see also **Block v. Woodbury**, 211 Ga. App. 184 (1) (438 S.E.2d 413) (1993)." **Sorrells Constr. Co. v. Chandler Armentrout** &c., 214 Ga. App. 193, 194 (447 S.E.2d 101) (1994)."[10]

"**McNeal v. Paine, Webber &c.**, 249 Ga. 662(2) (293 S.E. 2d 331)(1982), distinguished ***Gilmer***, supra , holding that an employee was in privity with his employer for purposes of determining whether issue preclusion was applicable. ***Sorrells Constr. Co.***, supra."[11]

The Georgia Court of Appeals has said in the case of **Clark v. State**:

"The Supreme Court held in **Ashe** that the Fifth Amendment guarantee against double jeopardy embodies collateral estoppel as a constitutional requirement. And the protections afforded by the double jeopardy clause are binding upon the states through the Fourteenth Amendment. **Benton v. Maryland**, 395 U.S. 784 (89 SC 2056, 23 L.Ed.2d 707)." [12]

It is Petitioners contention district court erred when it conducted a de novo inquiry into Petitioners **not for good cause employment dismissal** after Judge Smith's finding that

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9. **Parklane Hosiery Co. v. Shore**, 439 U.S. 322, 326 (99 S.Ct. 645, 645-646, 58 L.Ed.2d 552)(1979)

10. Citing **Smith v. Maytag Corp.**, 216 Ga. App. 676, 679 (1995) 455 S.E.2d 379.

11. Citing **Smith v. Maytag Corp.**, 216 Ga. App. 676, 680 (1995) 455 S.E.2d 379.

12. Citing **Clark v. State**, 194 Ga. App. 280, 281 (1990) 390 S.E.2d 425. Quoting **Ashe v. Swenson**, 397 U.S. 436 (90 S.Ct. 1189, 1190, 25 L.Ed.2d 469 (1970) and **Benton v. Maryland**, 395 U.S. 784 (89 S.Ct. 2056, 2057, 23 L.Ed.2d 707).

Petitioners did not intentionally fail to obey orders, rules, or instructions, or intentionally fail to discharge the duties for which employed and ruling otherwise.

This Court has described the consequences of the procedural posture the Respondent has taken involving prior proceedings and the proceedings of this case in **Smelting Co. v. Kemp**:

"In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment is such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment."[13]

"The presumptions thus attending it are not open to rebuttal in an action at law."[14]

"[T]he statute then proceeds to declare that if an adverse claim is filed during the period of publication, it must be upon oath of the party making it, and must show the nature, boundaries, and extent of such adverse claim; and all proceedings, except the publication of the notice and the making and filing of the affidavit, shall be thereupon stayed until the controversy shall have been settled by a decision of a court of competent jurisdiction, or the adverse claim waived."[15]

Since, the Respondent did not file a direct appeal of the decision of the Administrative Law Judge as rendered, the

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13. Citing **Smelting Co. v. Kemp**, 104 U.S. 636, 640 (1881)

14. Citing **Smelting Co. v. Kemp**, 104 U.S. 636, 641 (1881)

15. Citing **Smelting Co. v. Kemp**, 104 U.S. 636, 656 (1881)

Respondent has conceded the fact findings of the Administrative Law Judge in Petitioners employment appeal case.

This Court has said in the case of in **Johnson v. Towsley**:

"The general proposition is recognized that when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions within the scope of its authority are conclusive."[16]

This Court has said in the case of **United States v. California &c. Land Co.** :

"Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of **United States v. Arredondo**, 6 Pet. 691, 729, this court said: "It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, (1 Cranch, 170, 171,) legislative, (4 Wheat. 423; 2 Pet. 412; 4 Pet. 563,) judicial, (11 Mass. 227; 11 S. & R. 429; adopted in 2 Pet. 167, 168,) or special, (20 Johns. 739, 740; 2 Dow P.C. 321, etc.,) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law." See also the following cases: **Foley v. Harrison**, 15 How. 433, 448; **Johnson v. Towsley**, 13 Wall. 72, 83; **Smelting Company v. Kemp**, 104 U.S. 636, 640; **Shepley v. Cowan**, 91 U.S. 330, 340; **Moore v. Robbins**, 96 U.S. 530, 535; **Quinby v. Conlan**, 104 U.S. 420, 426; **Steel v. Smelting Co.**, 106 U.S. 447, 450; **Lee v. Johnson**, 116 U.S. 48, 51; **Wright v.**

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16. Citing **Johnson v. Towsley**, 80 U.S. 72, 72 (1871)

Roseberry, 121 U.S. 488, 509."[17]

This Court has said in the case of Steel v. Smelting Co.:

"'It is this unassailable character [of the patent] which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence.' 104 U.S. 636, 641."[18]

In the Eleventh Circuit there is controlling case law and this Circuit has said in the case of **Holley v. Seminole County School District**:

"We reiterate that whether there was "good cause" not to renew Holley's contract ***is not a de novo inquiry***. However, such an inquiry is fundamentally different from the one which is designed to protect First Amendment freedoms, primarily because the former is a question of state law. See Ga. Code Ann. § 20-2-940(a)(1)-(8)(enumerating 'good cause' criteria). The property interest that Holley has in his employment exists by virtue of the state requiring 'good cause' not to renew his contract, see Part II,

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17. Citing United States v. California &c. Land Co., 148 U.S. 31, 43-44 (13 S.Ct. 458, 463) (1893). Quoting Lee v. Johnson, 116 U.S. 48, 51 (6 S.Ct. 249, 250)(1885), Wright v. Roseberry, 121 U.S. 488, 509 (7 S.Ct. 985, 999)(1887).

18. Citing Steel v. Smelting Co., 106 U.S. 447, 454-455 (1 S.Ct. 389, 396)(1882).

supra; state-created procedures, if in keeping with due process, are generally adequate to safeguard such interests. Cf. **Parratt v. Taylor,**[19] 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)." (Emphasis added).[20]

In Georgia, as a general rule, "[w]hen an employment contract requires that termination be 'for cause' only, and the employer fires the employee without cause, a substantive breach occurs, and the employee would be entitled to seek full compensatory damages.." **Savannah College of Art & Design v. Nelph**, 256 Ga. 662-663(1) (460 S.E.2d 792) (1955). . . "such conduct discredit[ing] Employer or [was] detrimental to the reputation, character and standing of Employer" are disputed questions of material fact and matters of credibility that a jury must resolve. See **Cherokee County Hops. Auth. v. Beaver**, 179 Ga. App. 200, 205(2) 345 S.E.2d 904 (1986)(summary judgment precluded where question of credibility arises as to material issue). Citing **Salhab v. Tift Heart Ctr., P.C.**, 260 Ga. App. 799, 581 S.E.2d 363 (2003).

REASONS FOR GRANTING THE WRIT AND CONCLUSION

To determine Whether when a State of Georgia agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, will Georgia federal courts in actions under the Reconstruction civil rights statutes must give the agency's factfinding the same preclusive effect to which it would be entitled

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19. **Parratt v. Taylor,** 451 U.S. 527 (101 S.Ct. 1908, 1914-1915, 68 L.Ed.2d 420 (1981).

20. Citing **Holley v. Seminole County School District**., 755 F.2d 1492 (11th Cir. 1985).

in the State's courts as in the United States Court of Appeals for the Sixth Circuit.

Petitioner's respectfully request the Honorable Court to grant the Petitioners for Writ of Certiorari in order to prevent a collisions of authority across this country. And reverse and remand the Judgments of the federal courts in Georgia in favor of the Respondent and Against the Petitioner with respect to Petitioners reconstruction civil rights claim

Respectfully submitted,

Irene L. Stephens

Irene L. Stephens
Petitioner, In Propria Persona
1409 Back Cove Road
Virginia Beach, VA 23454

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Supreme Court, U.S.
FILED
NOV 14 2005
OFFICE OF THE CLERK

No. 05-637

In The

Supreme Court of the United States

IRENE L. STEPHENS,

Petitioner,

vs.

GEORGIA DEPARTMENT OF TRANSPORTATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

APPENDIX
VOLUME I

Irene L. Stephens
Petitioner, In Propria Persona
1409 Back Cove Road
Virginia Beach, VA 23454
(757) 332-0636

APPENDIX Vol. I, App. I- OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DATED AUGUST 17, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-14222
Non-Argument Calendar

IRENE L. STEPHENS,

Plaintiff-Appellant,

versus

GEORGIA DEPARTMENT OF TRANSPORTATION,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before TJOFLAT, ANDERSON and DUBINA, Circuit Judges.

PER CURIAM:

the Petition(s) for Rehearing are DENIED and no member of

this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Signed [unknown signature]
UNITED STATES CIRCUIT JUDGE

APPENDIX Vol. I, App.II - OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DATED MAY 31, 2005

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-14222
Non-Argument Calendar

IRENE L. STEPHENS,

Plaintiff-Appellant,

versus

GEORGIA DEPARTMENT OF TRANSPORTATION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

Before TJOFLAT, ANDERSON and DUBINA, Circuit Judges.

APPENDIX Vol. I, App.II

PER CURIAM:

Irene L. Stephens, proceeding pro se, appeals several decisions by the district court in her civil action filed against the Georgia Department of Transportation ("DOT"). She claimed, inter alia, the the DOT denied her a transfer and terminated her based on illegal, discriminatory motives. Stephens appeals the following procedural decisions: (1) the denial of her motion for sanctions; (2) the denial of her motion to amend her complaint; (3) the grant of the DOT's motion to strike portions of the record; and (4) the denial of her motion to dismiss her complaint without prejudice. Stephens also appeals the district court's grant of summary judgment in favor of the DOT. We affirm the district court in all respects. Stephens' arguments are addressed in turn.

I. STEPHENS' PROCEDURAL ARGUMENTS

A. Denial of Stephens' Motion for Sanctions

Stephens argues thath her due process rights were violated by virtue of the DOT's alleged destruction of a 1994 employee handbook and its alleged obstruction of justice. Applying a liberal reading of Stephen's appellate bried, it appears that she is asserting that the district court erred by denying her motion for sanctions under Fed.R.Civ.P.11 because the DOT was acting in bad faith throughout the litigation. See Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596 (1972)(holding that pro se pleadings are held to less stringent standards than counseled pleadings).

We review the district court's determinations regarding sanctions for abuse of discretion. Souran v. Travelers Ins. Co., 982 F.2d 1497, 1506 (11th Cir 1993). Federal Rule of Criminal Procedure 11(c) provides for sanctions when parties make certain representation to the court. District courts may impose

sanctions pursuant to Fed.R.Civ.P. 11(c) "(1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; and (3) when the party files a pleading in bad faith for and improper purpose." Souran, 982 F.2d at 1506 (internal quotations omitted). Stephens' claim that the DOT acted in bad faith by concealing the 1994 employee handbook is without merit. Stephens admittedly possessed a copy of the handbook. Stephens did not produce any evidence of bad faith on the part of the DOT. Accordingly, the district court did not abuse its discretion by denying Stephens's motion for sanctions.

(B) Denial of Stephens's Motion to Amend her Complaint

Stephens argues that the district court "erred and/or abused [its] discretion by denying her motion for leave to amend her already amended complaint. Although leave to amend should be liberally granted when necessary in the interest of justice, the decision is committed to the district court's discretion and grant or denial of leave to amend is reviewed for abuse of discretion. Jennings v. BIC CORP., 181 F.3d 1250, 1258 (11th Cir. 1999); Fed R. Civ.P.15(a).

Stephens filed the motion to amend over six months after the deadline set by the Scheduling Order. Stephens' motion was thus untimely, and Federal Rule of Civil Procedure 16(b) requires her to show good cause in order for the court to grant her motion. Fed.R.Civ.Pro. 16(b). The only reason Stephen offered for the delay is that she discovered a new legal theory through additional research. We do not find that the district court abused its discretion in holding that this proffered

reason was insufficient to show good cause. See Jennings. 181 F.3d at 1268 (11th Cir. 1999)(stating that undue delay is an adequate basis for denying leave to amend).[1]

(C) Grant of the DOT's Motion to Strike

We review the district court's evidentiary rulings for an abuse of discretion, reversing only when there is substantial prejudice. Brochu v. City of Riviera Beach. 304 F.3d 1144, 1155 (1th Cir. 2002). The Federal Rules of Civil procedure provide that "the court may order stricken from any pleading any insufficient defense or and redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). We conclude that the district court did not abuse its discretion in striking portions of Stephens's motion for summary judgment because it contained "immaterial,impertinent, or scandalous matter." See Fed. R.Civ.P. 12(f).

(D) Denial of Stephens's Voluntary dismissal of her Complaint Without Prejudice

Stephens argues that the district court erred by denying her motion to dismiss her complaint voluntarily without prejudice, asserting that the DOT would not lose any substantial rights as a result of the dismissal.

We review for abuse of discretion the district court's decisions regarding the dismissal of a complaint without prejudice. Pontenberg v. Boston Scientific Corp., 252 F.3d

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1. Having found that the district court did not abuse its discretion in denying Stephens' motion to amend, we do not reach the question of whether the employee handbook constituted a unilateral contract because that issue was only raised in the motion to amend.

1253, 1256 (11th Cir. 2001). The Federal Rules of Civil Procedure permit a plaintiff to dismiss an action voluntarily only "upon order of the court and upon such terms and conditions as the court deems proper" after the defendant has filed an answer to the complaint, unless there is a stipulation signed by all parties to the action. Fed.R.Civ.P.41(a). We have held that "[a] voluntary dismissal without prejudice is not a matter of right." Fisher v. P.R. Marine Mgmt., Inc., 940 F.2d 1502 (11th Cir. 1991).

> [I]n most cases, a voluntary dismissal should be granted unless the defendant will suffer clear legal prejudice, other than the mere prospect of a subsequent lawsuit, as a result. The crucial question to be determined is, Would the defendant lose any substantial right by the dismissal. In exercising its broad equitable discretion under Rule 41(a)(2), the district court must weigh the relevant equities and fo justice between the parties in each case, imposing such costs and attaching such conditions to the dismissal as are deemed appropriate.

Pontenberg, 252 F.3d at 1255-56 (citations, quotations, and emphasis omitted).

In Stephens's case, the DOT objected to a dismissal without prejudice, arguing that such a dismissal would be prejudicial due to its pending motion for summary judgment. Stephens filed her complaint in June 2002. She filed her motion to voluntarily dismiss without prejudice in May 2004. During that two year period, numerous motions had been filed, extensive discovery had been produced, and motions for summary judgment were pending. The district court agreed with the DOT's assertion that only a dismissal with prejudice would be appropriate. Stephens was not entitled to a voluntary dismissal without prejudice as a matter of right, and the DOT

demonstrated that it would be prejudiced by such a dismissal. Accordingly, the district cour did not abuse its discretion by denying Stephens's motion to dismiss her complaint voluntarily without prejudice.

II. STEPHENS' SUBSTANTIVE ARGUMENTS

In her complaint, Stephens alleged: (1) violations of her due process and equal protection right; (2) employment discrimination; and (3) retaliation for exercising a legal right. The district court read the complaint broadly in deference to Stephens' pro se status, and considered her to have alleged:(1) a violation of due process and equal protection rights pursuant to 42 U.S.C. § 1983; (2) a violation of Title VII of the Civil Rights Act; (3) a violation of the Americans with Disabilities Act ("ADA"); and (4) a violation of the Age Discrimination Employment Act ("ADEA"). The district court granted summary judgment to the DOT on all claims.[2]

We review the district court's grant of a motion for summary judgment de novo, " applying the same legal standards that bound the district court." Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1279 (11th Cir. 2004). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

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2. On appeal, Stephens also argues that a psychologist who was supposed to examine her on December 8, 2000, improperly released her medical records to the DOT. Stephens did not raise this issue in the district. We generally will not consider issues raised for the first time on appeal, with several exceptions, including the issue "involved a pure question of law. and if refusal to consider it would result in a miscarriage of justice." Narey v. Dean, 32 F. 3d 1521, 1526-27 (11th Cir. 1994). Since Stephens raised her claim regarding "patient/client confidentiality" for the first time on appeal, and our refusal to consider it will not result in a miscarriage of justice, we conclude that Stephens waived this claim.

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). A material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 258, 106 S.Ct. At 2510.

A. Sovereign Immunity

The district court granted summary judgment to the DOT on Stephens' § 1983, ADA, and ADEA claims after finding that the DOT had immunity pursuant to the Eleventh Amendment. Stephens brought her claim solely against the Georgia department of transportation. As an arm of the state, the DOT is entitled to the same sovereign immunity of the state itself. Robinson v. Ga. Dep't of Transp., 966 F.2d 637, 640 (11th Cir. 1992). Congress has not abrogated immunity for claims brought pursuant to § 1983, the ADEA, or the ADA. See id. (holding that the Eleventh Amendment barred plaintiff's § 1983 against georgia DOT); Kimel v. Fla.Bd. of Regents, 528 U.S. 62, 120 S.Ct. 631 (2000)(holding that the ADEA did not validly abrogate eleventh Amendment immunity); Bd. Of Trs. of Ala. V. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001)(holding that state agencies were entitled to Eleventh Amendment immunity from employes' claims brought pursuant to the ADA). Therefore, the district court's grant of summary judgment on these claims was proper.

B. Title VII

The district court, reading Stephens' claim liberally, stated that she alleged several cognizable theories under a Title VII claim: (1) that Stephens was denied a transfer and ultimately terminated because of her sex; (2) that she was a victim of disparate treatment; and (3) that she was retaliated

against because of he sex. The district court found that Stephens failed to establish a prima facie case under Title VII and that even is she had established a prima facie case, the DOT came forward with a legitimate, non-discriminatory reason for terminating her that Stephens could not show was pretextual.[3]

A plaintiff may establish a prima facie case of discrimination by virtue of the denial of a job transfer or termination by showing that (1) she is a member of a protected class; (2) she is qualified for the position; (3) she was subjected to adverse employment action; and (4) she was replaced by a person outside the protected class. Kelliher v. Veneman, 313 F.3d 1270, 1275 911th Cir. 2002). The plaintiff generally has the burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) Establishing a prima facie case of discrimination creates a presumption of unlawful discrimination, and the employer must come forward with evidence of a legitimate non-discriminatory reason for its decision. Id. At 802, 93 S.Ct. At 1824. This burden is "exceedingly light," and the employer must merely proffer non-discriminatory reasons, not prove them. Perryman v. Johnson

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3. Stephens argues that the district court erred by conducting a de novo inquiry of her claims because, during her action to obtain state unemployment benefits, a state administrative hearing officer allegedly had already ruled on the merits of her claims by determining that the DOT had failed to meet its burden of proof to establish Stephens's ineligibility ofr benefits. By finding that the DOT had failed to meet its burden of proof to establish Stephens's disqualification unemployment benefits, the state administrative hearing officer did not address the merits of any potential ADEA, ADA, or Title VII claims. Furthermore, the state administrative ruling does not have a preclusive effect over Stephens's Title VII claims. See Bishop, 361 F.3d 607, 610 (11th Cir. 2004). Accordingly, the district court did not err by conducting a de novo review of the case before granting summary judgment in favor of the DOT.

Prods. Co., 698 F.2d 1138, 1142 (11th Cir. 1983). When the employer expresses one or more legitimate reasons for its actions, the preseumption of discrimination evaporate, and the plaintiff must raise a genuine issue of material fact as to whether the reasons offered by the defendant are pretextual. McDonnell Douglas, 411 U.S. at 804, 93 S.Ct. at 1825.

Assuming arguendo that Stephens established a prima facie case with respect to one or more of her claims, summary judgment for the DOT was nevertheless appropriate because it offered legitimate, non-discriminatory reasons for her termination, and Stephens did not produce evidence creating a genuine issue of material fact that the proffered reasons were pretextual. Stephens refused to follow her supervisors' direction on several occasions, took frequent sick leave, and took a state vehicle and drove dangerously on public roads. Even after this, this DOT attempted to meet with her and work with her, but she refused to cooperate. Any of these reasons are sufficient legitimate reasons for termination, and nothing in the record indicated they are pretextual.

III. Conclusion

Upon careful review of the record and the parties' briefs, we find no reversible error.[4]

AFFIRMED.

ENTERED FOR THE COURT:

Signed [unknown signature]
UNITED STATES CIRCUIT JUDGE

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4. Other arguments asserted on appeal are rejected without need for further discussion.